

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARL A. LARSON,
MARK N. KIRSCH,
JEFFREY A. PETERSON,
GERALD E. BOVE,
MICHAEL J. CAGGIANO,
JEFFREY C. LENNON,
KENNETH EDBAUER,
GEORGE DEWALD,
MICHAEL J. EDDY and
THOMAS FREEDENBERG,

Case No. 07-CR-304S

Defendants.

**JOINT DEFENSE SUBMISSION IN
SUPPORT OF ENMONS INSTRUCTION
AND RELATED THEORY OF DEFENSE**

Respectfully submitted,

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PRELIMINARY STATEMENT

In United States v. Mulder, 273 F.3d 91 (2001), the Second Circuit held that the defendants were entitled to have the jury instructed concerning the Enmons exception to the Hobbs Act. See, United States v. Enmons, 410 U.S. 396, 93 S.Ct. 1007 (1973).

This holding was entirely consistent with the longstanding legal principle that a defendant is entitled to a "theory of the defense" instruction. United States v. Crowley, 236 F.3d 104, 111 (2d Cir. 2000); United States v. Bok, 156 F.3d 157, 163 (2d Cir. 1998); United States v. Abcasis, 45 F.3d 39, 42 (2d Cir. 1995); United States v. Dove, 916 F.2d 41, 45 (2d Cir. 1990); United States v. Tonawanda Coke Corp., 2013 U.S. Lexis 25398, *13 (W.D.N.Y. 2013), citing United States v. Hurtado, 47 F.3d 577, 584 (2d Cir. 1995) ("A defense theory must be charged as long as it has some foundation in the proof, no matter how tenuous that defense may appear to the trial court.") and United States v. Johnson, 994 F.2d 980, 988 (2d Cir. 1993) ("A criminal defendant is entitled to a jury charge that reflects any defense theory for which there is a foundation in the evidence.").

Mulder's holding has never been overturned either by the Supreme Court or the Second Circuit sitting *en banc*, and consequently is binding in this case. United States v. King, 276 F.3d 109, 112 (2d Cir. 2002).

DISCUSSION

Due consideration of the egregiously outrageous conduct perpetrated by the defendants in Mulder virtually compels the conclusion that the Enmons instruction is appropriate in this case.

The Mulder case involved a labor coalition whose ostensible legitimate purpose was to persuade contractors to hire more minority workers. 273 F.3d at 98. The trial evidence established that none of the contractors who were approached by the defendants ever discriminated against minorities. Moreover, the trial evidence demonstrated that there was no increase in minority workers as a result of the defendants' activities. 273 F.3d at 98.

In addition, the trial evidence established that the defendants received kickbacks from those laborers who they placed for employment. Moreover, the trial evidence indicated that the defendants obtained "no show jobs" as "coalition coordinators" for themselves. The trial evidence demonstrated that the only function of the "coalition coordinators" was to fend off other rival coalitions who sought jobs at various construction sites. 273 F.3d at 98-99. In fact, the trial evidence disclosed that, during the conspiracy, defendant Eric Mulder actually killed a member of a rival coalition. Id. Furthermore, the evidence established that certain of the defendants, in furtherance of the conspiracy, worked with members of the Gambino organized crime family "to protect their mutual interests." 273 F.3d at 99. Indeed, the Second Circuit rejected an evidentiary challenge to various co-conspirator declarations based upon the trial evidence which established that a conspiracy existed between some of the defendants and members of the Gambino crime family. 273 F.3d at 102-104.

Despite the trial record as outlined above, the Court delivered an instruction pursuant to Enmons. In pertinent part, the trial court instructed the jury as follows:

The Hobbs Act, which describes the crime of extortion, does not apply to labor disputes in which workers seek to obtain lawful and legitimate labor objectives

This exception does not imply that violence is lawful or proper in general. Obviously, it is not. Therefore, the labor exception to the Hobbs Act does not apply to efforts to

obtain jobs from contractors whom the defendants reasonably believed did not discriminate or violate employment laws, or to efforts to obtain money or wages for unwanted or superfluous employees[,] no-show jobs[,] or contracts, or other valuable consideration. . . .

The government has the burden of proving beyond a reasonable doubt that the labor exception does not apply. 273 F.3d at 104-105.

At trial, the defense requested that the Court also instruct the jury as follows:

Acts of violence are prohibited by other laws. Whether or not such laws have been violated here, however, is irrelevant to the issue that you have to consider. The issue here is whether the defendants have violated this specific statute -- the Hobbs Act.

A labor dispute, within the labor exception to the Hobbs Act, is a dispute between an employer and an individual employee, a group of employees, a representative of employees or any group of individuals seeking legitimate employment with an employer. The dispute need not involve representatives of recognized labor unions nor need it involve claims of contract violations by the employer. It can include good faith attempts to obtain jobs for minorities from contractors or subcontractors. 273 F.3d at 105 (*emphasis added*).

In resolving the issue on appeal, the Second Circuit stated as follows:

Defendants' proposed language is legally correct and may have helped the jury better understand the counter-intuitive proposition that the use of violence in a labor dispute does not violate the Hobbs Act. However, the Court's charge also was correct. 273 F.3d at 105 (*emphasis added*).

The defense submits that this Court should pursue the "better" course by incorporating the defense requests to charge in Mulder with the actual charge delivered by the Court in that case.

Ironically, the prosecution cites the Mulder case on matters other than the Enmons exception in support of its own requested jury instructions [Docket No. 376; Proposed Instructions numbered 2, 30, 33 and 48].

In Enmons, the Supreme Court noted as follows:

The legislative framework of the Hobbs Act dispels any ambiguity in the wording of the statute and makes it clear that the Act does not apply to the use of force to achieve legitimate labor ends. 410 U.S. 396, 401, 93 S.Ct. 1007, 1010 (1973).

CONCLUSION

The Court should instruct the jury on the Enmons exception to the Hobbs Act and should also permit the jury to consider a theory of defense premised upon this well-settled principle.

DATED: December 12, 2013
Buffalo, New York

Respectfully submitted,

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**AND JOINTLY ON BEHALF
OF ALL DEFENDANTS HEREIN**

CERTIFICATE OF SERVICE

I hereby certify that on December 12, 2013 I electronically filed the Joint Defense Submission in Support of Enmons Instruction and Related Theory of Defense with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following:

Anthony M. Bruce, Esq.
Edward H. White, Esq.
Assistant United States Attorneys

Robert S. Tully, Esq.
Trial Attorney, United States Department of Justice

Defense Counsel

I further hereby certify that I have mailed by the United States Postal Service said document to the following non-CM/ECF participants:

/s/ Sandra Lee Wright
SANDRA LEE WRIGHT